

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia

JANUARY TERM, 1933

No. 5892 331

JAMES P. SHEA, ~~APPELLANT,~~

Guy L. Helvering

vs. Petitioner,

**~~DAVID BURNET,~~ COMMISSIONER OF INTERNAL
REVENUE.**

APPEAL FROM THE BOARD OF TAX APPEALS.

FILED JANUARY 28, 1933.

PRINTED MARCH 6, 1933.

Court of Appeals of the District of Columbia

JANUARY TERM, 1933

No. 5892

JAMES P. SHEA, APPELLANT,

vs.

DAVID BURNET, COMMISSIONER OF INTERNAL
REVENUE.

APPEAL FROM THE BOARD OF TAX APPEALS.

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Court of Appeals of the District of Columbia

No. 5892.

JAMES P. SHEA, Appellant,

vs.

DAVID BURNET, Commissioner of Internal Revenue.

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Docket No. 55268.

JAMES P. SHEA, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Appearances:

Taxpayer: Albert L. Clothier, Esq.

Commissioner: C. A. Rays, Esq.

Docket Entries.

1931.

Apr. 2. Petition received and filed. Taxpayer notified. Fee paid.

“ 2. Copy of petition served on General Counsel.

“ 27. Answer filed by General Counsel.

May 4. Copy of answer served on taxpayer.

1932.

Apr. 13. Motion to consolidate with dockets 55269, 70, 71 and 55184. Filed by General Counsel. 4/14/32 granted.

“ 13. Motion for order to produce records filed by General Counsel.

“ 15. Order to produce records, entered.

“ 15. Hearing set May 4, 1932.

1932.

May 4. Notice of appearance of Albert L. Clothier as counsel for taxpayer filed.

“ 4. Hearing had before Mr. Black, Div. 15 on merits. Briefs due in 90 days.

Jun. 8. Motion for extension to August 1, 1932 to file briefs, filed by General Counsel. 6/10/32 granted.

“ 10. Transcript of hearing May 4, 1932 filed.

Aug. 1. Brief filed by taxpayer.

“ 1. Brief filed by General Counsel.

“ 24. Findings of fact and opinion rendered, Mr. Black, Div. 15.

Decision will be entered for the Commissioner.

“ 25. Decision entered, Mr. Black, Div. 15.

Nov. 22. Stipulation of venue filed.

“ 22. Petition for review by Court of Appeals of the District of Columbia with assignments of error filed by taxpayer.

“ 22. Proof of service filed.

“ 22. Præcipe filed—proof of service thereon.

1933.

Jan. 20. Order entered extending time to January 31, 1933 for transmission of record.

2 [Stamp:] United States Board of Tax Appeals.
Filed Apr. 2, 1931.

United States Board of Tax Appeals.

Docket No. 55268.

JAMES P. SHEA, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Petition.

The above named petitioner hereby petitions for a re-determination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IT:AR:A-2 MHS-60D dated February 4, 1931, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual residing at Bayside Avenue & Parsons Boulevard, Flushing, Long Island, New York.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the petitioner on February 4, 1931.

3. The taxes in controversy are income taxes for the calendar year 1928 and for thirty eight dollars and forty two cents (\$38.42).

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

3 The addition to petitioner's net income of a payment of \$454.22 received from Fred'k H. Levey Co., Inc., of 59 Beekman Street, New York, New York, during the year 1928.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) Petitioner during the year 1928 was the Secretary of Fred'k H. Levey Co., Inc.

(b) On January 23, 1928, the Board of Directors of Fred'k H. Levey Co., Inc. adopted a resolution authorizing the payment to petitioner of an amount equal to the Federal and New York State income taxes which his salary from the company caused him to pay in 1928 for the year 1927.

(c) The said resolution specifically stated that the payment described above was made as a gift from the Company and not as an extra compensation for services rendered.

(d) A resolution was adopted at the 1929 annual meeting of the stockholders approving the acts done by the Directors during the preceding year.

(e) In preparing the Federal Income tax return of the Corporation for the year 1928, the above item of \$454.22 was not claimed as a deduction, but was included in the entry made in Item 13(a) under Schedule L designated as "Donations, gratuities and contributions."

4 (f) In the examination of the corporation's return for 1928, no objection was made by the Commissioner of Internal Revenue to the treatment of the above item as a donation or gift.

Wherefore the petitioner prays that this Board may hear the proceeding and relieve the petitioner from the payment

of income tax on a payment made as a gift, received with the understanding that such payment was a gift and treated consistently by the corporation in its income tax return as a gift.

ALBERT L. CLOTHIER,
Counsel for Petitioner,
475 Fifth Avenue,
New York, New York.

5 STATE OF NEW YORK,
County of New York, ss:

James P. Shea being duly sworn, says that he is the petitioner above named; that he has read the foregoing petition and is familiar with the statements contained therein, and the facts stated are true.

JAMES P. SHEA.

Subscribed and sworn to before me this 30th day of March 1931.

[Seal of William Nagy, Notary Public, Kings County.]

WILLIAM NAGY,
Notary Public, Kings County.

Kings Co. Clerk's No. 13, Reg. No. 2017.

New York Co. Clerk's No. 66, Reg. No. 2 N 66.

Commission expires March 30, 1932.

6 EXHIBIT "A."

(Copy.)

Treasury Department, Washington.

Office of Commissioner of Internal Revenue.

Feb. 4, 1931.

Mr. James P. Shea,
Bayside Avenue and Parsons Boulevard,
Flushing, New York.

SIR:

You are advised that the determination of your tax liability for the year(s) 1928 discloses a deficiency of \$38.42 as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier;

Whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,
Commissioner,

(Signed)

By J. C. WILMER,
Deputy Commissioner.

Enclosures: Statement, Form 882, Form 870.

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Statement.

IT:AR:A-2. MHS-60D.

In re Mr. James P. Shea, Bayside Avenue and Parsons Boulevard, Flushing, New York.

Tax Liability.

Year.	Tax liability.	Tax assessed.	Deficiency.
1928	\$639.12	\$600.70	\$38.42

Reference is made to the report of the internal revenue agent in charge, 17 Battery Place, New York, New York, covering an investigation of your income tax liability for the year 1928 and to a telegram from this office dated November 28, 1930.

As a result of your protest to this office dated December 2, 1930, conferences were held in this office December 10, 1930, and January 7, 1931, at which you were represented by Mr. Albert L. Clothier, 475 Fifth Avenue, New York, New York.

The question at issue was whether the amounts reimbursed for Federal and State income taxes by Frederick H. Levey and Company to the officers on their salaries represent taxable income or are to be treated as a gift. You are advised, however, that from all evidence submitted and facts presented, it is held by this office that the amounts in question constitute taxable income to the recipients in the year in which received.

The synopsis of your income and tax liability is set forth in revenue agent's report dated July 1, 1930, which is hereby made a part of this letter.

A copy of this communication is being forwarded to your attorney in accordance with authority conferred in your power of attorney.

8-16 [Stamp:] United States Board of Tax Appeals.
Filed Apr. 27, 1931.

United States Board of Tax Appeals.

Docket No. 55268.

JAMES P. SHEA, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Answer.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition.

4. Denies that the respondent erred in the manner alleged in paragraph 4 of the petition.

5 (a), (b) and (c). Admits the allegations contained in subparagraphs (a), (b) and (c) of paragraph 5 of the petition.

5 (d), (e) and (f). Denies the allegations contained in subparagraphs (d), (e) and (f) of paragraph 5 of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

Wherefore it is prayed that petitioner's appeal be denied.

(Signed)

C. M. CHAREST,

General Counsel,

Bureau of Internal Revenue.

Of Counsel:

C. A. RAY,

Special Attorney,

Bureau of Internal Revenue.

4-25-31.

amm.

17-19 United States Board of Tax Appeals, Washington.

Docket No. 55268.

JAMES P. SHEA, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Decision.

Pursuant to the determination of the Board, as set forth in its report promulgated August 24, 1932, it is

Ordered and decided that there is a deficiency of \$38.42 for the year 1928.

Enter.

(Signed)

EUGENE BLACK,

Member.

Entered Aug. 25, 1932.

20 [Stamp:] United States Board of Tax Appeals.
Filed Nov. 22, 1932.

United States Board of Tax Appeals.

Docket No. 55268.

JAMES P. SHEA, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Petition for Review.

To the Honorable the Judges of the Court of Appeals of
the District of Columbia:

Your petitioner, James P. Shea, respectfully shows:

I.

Jurisdiction for Review.

This is a proceeding for review by the Court of Appeals of the District of Columbia of a decision of the United States Board of Tax Appeals, entered on the 25th day of August, 1932, and redetermining a deficiency in income taxes for the calendar year 1928 against your petitioner, in the amount of \$38.42.

On the 15th day of November, 1932, counsel for petitioner and counsel for respondent entered into an agreement, under and pursuant to the provisions of Section 1002(d) of the Revenue Act of 1926, that said decision of the United States Board of Tax Appeals may be reviewed by this Court.

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II.

Your petitioner, at the time of filing this petition is and for a considerable time prior thereto, was, a citizen of the State of New York.

III.

Nature of Controversy.

The controversy before the United States Board of Tax Appeals involved the question as to whether an amount re-

ceived by the petitioner during the year 1928, was additional compensation for services and taxable as such, or a gift by the corporation to petitioner and as such not taxable.

Petitioner was a director and secretary of The Frederick H. Levey Company, Inc. At a meeting of the Board of Directors held February 23, 1928, at which the annual compensation of each of the officers of the corporation for the year 1928 was determined by resolution, a resolution was passed providing that the corporation would pay to its five officers, including the petitioner "the amount their salaries caused them to pay a Federal and State Income Tax for the year 1927; this as a gift from the Company, and not as an extra compensation for services rendered." Under the terms of this resolution, the petitioner received from the corporation during the year 1928 the sum of \$454.22.

At the annual meeting of the stockholders held in the year 1929, all acts of the directors of the corporation during the preceding year were approved.

22 The returns of the corporation for the year 1928 included the aforesaid payment to the petitioner in Item 13(a) as an unallowable deduction and did not claim such item as an expense or a deduction, but treated it as a donation, contribution or gratuity. Petitioner did not include that amount as taxable income in his income tax return for the year 1928. The Commissioner of Internal Revenue recomputed petitioner's income and asserted a deficiency of income tax amounting to \$38.42 based upon the inclusion of said amount of \$454.22 in petitioner's taxable income for said year.

On appeal to the United States Board of Tax Appeals, the said Board affirmed the action of the Commissioner of Internal Revenue in including said item in the taxable income of petitioner.

The sole question here is whether the action of the Board was proper under the law and evidence.

IV.

Assignments of Error.

Your petitioner further shows that he is aggrieved by the action of the said Board and injured thereby and that the errors complained of are as follows:

The said Board erred in finding that the amount received by the petitioner from The Frederick H. Levey Company, Inc., under the resolution of the Board of Directors
23 providing that said amount was a gift from the company, was additional compensation for services rendered instead of a gift by the corporation and as such not taxable.

Wherefore your petitioner prays that this Court may review the decision of the United States Board of Tax Appeals in this cause, directing said Board to enter a decision in favor of the petitioner determining that there is no deficiency in income taxes for the year 1928 due from the petitioner; and that this Court may grant such other and further relief as may appear proper in the premises.

(Signed) W. W. ROSS,

832 Shoreham Bldg.,
Washington, D. C.;

(Signed) R. S. DOYLE,

832 Shoreham Bldg.,
Washington, D. C.;

(Signed) ALBERT L. CLOTHIER,

475 Fifth Avenue,
New York, N. Y.,
Attorneys for Petitioner.

24 DISTRICT OF COLUMBIA, ss:

W. W. Ross, being duly sworn says:

I am the attorney for the petitioner in this proceeding; I prepared the foregoing petition and am familiar with the contents thereof. The allegations of fact contained therein are true to the best of my knowledge, information and belief. This petition is not filed for purposes of delay, and I believe the petitioner is justly entitled to the relief sought.

(Signed)

W. W. ROSS.

Subscribed and sworn to before me this — day of November, 1932.

(Signed)

CAROLYN G. GROFF,
Notary Public.

25 [Stamp:] United States Board of Tax Appeals.
Filed Nov. 22, 1932.

United States Board of Tax Appeals.

Docket No. 55268.

JAMES P. SHEA, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Præcipe for Transcript.

To the Clerk of the United States Board of Tax Appeals:

Please prepare a transcript of record in this cause, and on or before January 14, 1933, transmit the same to the Clerk of the Court of Appeals of the District of Columbia, and include in said transcript copies, duly certified as correct, of the following documents:

1. The docket entries of proceedings before the Board in the above-entitled cause;
2. Petition for redetermined, filed April 2, 1931;
3. Answer to petition, filed April 27, 1931;
4. Findings of fact and opinion of the Board, promulgated on August 24, 1932;
5. Order of redetermination, entered on August 25, 1932;
6. Agreement for review by the Court of Appeals of the District of Columbia, filed November 22d, 1932;
7. Petition for review, filed November 22d, 1932;
8. This præcipe for transcript.

(Signed)

W. W. ROSS,
832 Shoreham Bldg.,
Washington, D. C.,
Attorney for Petitioner.

Service of a copy of the foregoing præcipe for transcript accepted this 22 day of November, 1932.

(Signed)

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

26 United States Board of Tax Appeals, Washington.

Docket No. 55268.

JAMES P. SHEA, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Certificate.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 25, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Præcipe in the appeal as above numbered and entitled.

In testimony whereof I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 25th day of January, 1933.

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,

Clerk United States Board of Tax Appeals.

27 United States Board of Tax Appeals.

Docket No. 55268.

JAMES P. SHEA, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Order Enlarging Time.

For cause appearing of record, it is

Ordered that the time for filing certified copies of record papers *sur* petition for review of the above entitled proceeding in the Court of Appeals of the District of Columbia be and it is hereby extended to January 31, 1933.

(Signed)

LOGAN MORRIS,

Member.

Dated Washington, D. C., January 20, 1933.

A true copy. Teste:

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

28 In the Court of Appeals of the District of Columbia.

No. 5892.

JAMES P. SHEA, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Stipulation.

It is hereby stipulated and agreed between the parties hereto that inasmuch as the "findings of fact and opinion of the Board of Tax Appeals" in this matter appearing on page 9 of the transcript of record, and the "stipulation of venue" appearing on page 18 of the transcript of record, are included in the transcript in the case of Charles Bispham Levey, No. 5891, the printing of such documents in this case may be waived.

W. W. ROSS,
Counsel for Petitioner.
C. M. CHAREST,
Counsel for Respondent.

February 7, 1933.

[Endorsed:] No. 5892. James P. Shea v. Burnet, Commissioner of Internal Revenue. Stipulation waiving printing parts of Record. Court of Appeals, District of Columbia. Filed Feb. 7, 1933. Henry W. Hodges, Clerk.

Endorsed on cover: Board of Tax Appeals. No. 5892. James P. Shea, appellant, vs. David Burnet, Commissioner of Internal Revenue. Court of Appeals, District of Columbia. Filed Jan. 28, 1933. Henry W. Hodges, Clerk.